

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TINA PORTER,

Plaintiff,

V.

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

CASE NO. C05-5166FDB

ORDER ADOPTING REPORT
AND RECOMMENDATION
AND REMANDING FOR
FURTHER ADMINISTRATIVE
PROCEEDINGS

Plaintiff seeks disability insurance benefits alleging that she is disabled with a panic disorder with agoraphobia, possible nerve damages to her low back, post traumatic stress disorder, and depression. The Magistrate Judge recommends remand to the Administrative Law Judge for further proceedings because at the hearing, the Social Security Administration's medical expert, David Clemons, Ph.D. testified by telephone rather than appearing in person at the hearing.

Defendant objects, and in support of her position that vocational and medical experts may testify by telephone, files the declaration of David B. Washington, the Chief Administrative Law Judge of the Office of Hearing and Appeals (OHA) of the Social Security Administration, which sets forth some relevant history of the regulations regarding hearings as well as the provisions of the Hearings, Appeals and Litigation Law Manual (HALLEX).

At the hearing, Plaintiff objected to David Clemons, Ph.D. testifying by telephone. The ALJ stated that although she normally has the medical expert testify in person, in this instance she would take

1 the testimony by telephone in order “to keep the case moving.” She them stated that if there were
 2 problems with the telephone testimony, she would “be the first to agree” and that the hearing would be
 3 held over, and Plaintiff’s counsel agreed to this proposal. Once the hearing was underway, Dr. Clemons
 4 listened to Plaintiff’s testimony and asked Plaintiff several questions. Dr. Clemons was then placed under
 5 oath and was questioned by the ALJ who obtained his opinions about the nature and severity of Plaintiff’s
 6 impairments, and Plaintiff’s attorney also questioned Dr. Clemons.

7 The statute empowering the Commissioner to hold hearings provides for reasonable notice and
 8 opportunity for a hearing, authorizes the Commissioner to “administer oaths and affirmations, examine
 9 witnesses, and receive evidence,” and provides that “evidence may be received” at a hearing “even though
 10 inadmissible under rules of evidence applicable to court procedure,” but the statute is silent as to how the
 11 hearings are to be conducted. *See 42 U.S.C. § 405(b)(1)*. When a statute is silent or ambiguous, the courts
 12 must defer to a reasonable construction by the agency charged with its implementation and “[s]uch
 13 legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly
 14 contrary to the statute.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844
 15 (1984).

16 The regulations governing hearings before administrative law judges are found at 20 C.F.R. §§
 17 404.929 through 404.961. 20 C.F.R. § 404.950(e) states: “Witnesses at a hearing. Witnesses may appear
 18 at a hearing in person or, when the conditions in § 404.936(c) exist, by video teleconferencing.” Defendant
 19 argues that the Commissioner has not interpreted this regulation to list the exclusive means for taking
 20 testimony at a hearing and that taking testimony by telephone is not prohibited. Indeed, notes Defendant,
 21 testimony through interrogatories was referenced in the preamble to the Commissioner’s 2003 final rules
 22 “with request for comment” on the use of video teleconferencing for appearances at hearings. The
 23 Hearings, Appeals and Litigation Law Manual (HALLEX) was updated on September 28, 2005 to “add
 24 references to telephone and video-conference testimony.” Although the references to telephone testimony
 25 were new, the practice of obtaining testimony by telephone was not, according to Chief ALJ David B.
 26 Washington. Although the HALLEX is not binding, this internal agency guidance should be given
 27 deference. *See generally, Skidmore v. Swift and Co.*, 323 U.S. 134 (1944), *U.S. v. Mead*, 533 U.S. 218
 28 (2001). Washington states:

1 OHA [Office of Hearings and Appeals] has a long, established practice of permitting
 2 testimony by vocational and medical experts in administrative hearings before an ALJ by
 3 telephone. In the mid-1990s, OHA commenced a practice to permit testimony to be taken
 4 by telephone. To that end, OHA purchased equipment for its hearing offices to facilitate
 5 the taking of testimony by telephone.

6 Washington Decl. ¶ 3. Practical considerations are mentioned as well for allowing testimony to be
 7 presented by telephone. Hearings may be scheduled sooner when the expert does not have to travel, and
 8 insures complete testimony in those instances where expert testimony would not otherwise have been
 9 available. *Id.* ¶ 4. The Commissioner also contends that costs are reduced by the use of telephonic
 10 testimony.

11 Additionally, Defendant argues that the Plaintiff has not shown a due process violation, and the
 12 Magistrate Judge did not conclude that the asserted error in taking telephone testimony amounted to a due
 13 process violation.

14 Having reviewed the record and the parties' arguments, the Court concludes that the Magistrate
 15 Judge's decision is correct and that this matter must be remanded to the Secretary for further proceedings
 16 before another Administrative Law Judge.

17 Plaintiff points to three regulations at issue, each of which expressly contemplates either live
 18 witnesses or video teleconferencing. Moreover, as Defendant concedes, the HALLEX is not binding.
 19 While there may be practical reasons that support taking a witness's testimony by telephone, nevertheless,
 20 those reasons have not resulted in an express provision being placed in the regulations.

21 An administrative agency, such as the Social Security Administration is required to follow its own
 22 regulations. The ALJ's hearing notice failed to inform Plaintiff that the medical expert would not be
 23 present at the hearing and would testify by telephone. The Court agrees that the natural and plain meaning
 24 of the regulations in question establishes that there are only two methods by which a witness may appear at
 25 Social Security hearings, and a disability claimant is entitled to notice of which method will be used. The
 26 ALJ failed to comply with these regulations.

27 The Court, having reviewed plaintiff's complaint, the Report and Recommendation of Judge J.
 28 Kelley Arnold, United States Magistrate Judge, and objections to the report and recommendation, and the
 29 remaining record, does hereby find and ORDER:

30 (1) The Court adopts the Report and Recommendation;

- 1 (2) the ALJ erred in her decision as described in the report;
- 2 (3) the matter is remanded for further proceedings consistent with this decision before another
- 3 ALJ; and
- 4 (4) The Clerk is directed to send copies of this Order to Plaintiff's counsel, Defendant's counsel
- 5 and Magistrate Judge J. Kelley Arnold.

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7 DATED this 11th day of April 2006.

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FRANKLIN D. BURGESS

11 UNITED STATES DISTRICT JUDGE

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